

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1976.

No. 76-137

ELLEN R. DAVIS,

Petitioner,

against

ALBERT HECHT and LAURA HODAS, as Commissioners of
Election, Constituting the Board of Elections of the County of
Dutchess,

Respondents,

Petition for a Writ of Certiorari to the New York Supreme
Court, Appellate Division, Second Department.

ELLEN R. DAVIS, Petitioner

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In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976.

No.

ELLEN R. DAVIS,
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against
**ALBERT HECHT and LAURA HODAS, as
Commissioners of Election, Constituting
the Board of Elections of the County of
Dutchess,**
Respondents,

**Petition for a Writ of Certiorari to the New York Supreme
Court, Appellate Division, Second Department**

The Petitioner, ELLEN R. DAVIS, hereby petitions for a Writ of Certiorari to review the Order of the Supreme Court of the State of New York, Appellate Division, Second Department, entered herein on February 9, 1976, which affirmed the Order of the Supreme Court, Dutchess County, dated November 12, 1975, entered in the Office of the Dutchess County Clerk on November 13, 1975. The New York State Court of Appeals denied permission to appeal by Decision dated May 13, 1976.

Opinions Below.

Neither the opinion of the Supreme Court, Dutchess County, nor the opinion of the Appellate Division, Second Department, has been reported; they are appended hereto as appendices A and B, respectively. The opinion of the Court of Appeals of the State of New York denying Petitioner's requests for permission to appeal to the Court of Appeals has not been reported and is appended hereto as appendix E.

Jurisdiction.

The Order sought to be reviewed was made and entered on February 9, 1976. Permission to appeal to the Court of Appeals was denied on May 13, 1976. The statutory provision believed to confer on this Court jurisdiction to review the Order in question is 28 U.S.C. 1257 (3).

Questions Presented For Review.

1. Is the due process clause of the Fifth and Fourteenth Amendments violated by the action of the Election Commission in printing the Free Libertarian Party designation in only half the size of the print allotted to the Democratic, Republican, Conservative and Liberal Parties?

2. Is the equal protection clause of the Fourteenth Amendment violated by the action of the Election Commission in printing the Free Libertarian Party designation in only half the size of the print allotted to the Democratic, Republican, Conservative and Liberal Parties?

3. Were the First Amendment rights of the electors violated by the action of the Election Commission in printing the Free Libertarian Party designation in only half the size of the print allotted to the Democratic, Republican, Conservative and Liberal Parties?

4. Was Section 102 (2) of the New York Election Law applied in such a manner that it violated the provisions of Amendments First, Fifth and Fourteenth of the United States Constitution?

Constitutional Provisions Involved.

United States Constitution, First Amendment:

Congress shall make no law respecting ... the right of the people ... to petition the Government for a redress of grievances.

United States Constitution, Fifth Amendment:

... nor be deprived of life, liberty, or property, without due process of law; ...

United States Constitution, Fourteenth Amendment:

... nor shall any State deprive any person of live, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutory Provisions Involved.

New York Election Law, 102 (2) :

All ballots of the same kind for the same polling place shall be of precisely the same size, quality and shade of paper, and of precisely the same kind and arrangement of type and tint of ink. A different, *but in each case uniform kind of type* shall be used for printing the names of candidates the titles of offices, political designations, and reading form of constitutional amendments and other questions and propositions submitted. The names of candidates shall be printed in capital letters in black-faced type not less than one-eighth nor more than three-sixteenths of an inch in height. (Emphasis added).

Statement of the Case.

Some time prior to the elections held November 4, 1975, the Respondents (Commissioners of Election) printed and delivered to the designated polling places in the Town of East Fishkill, Ballots in the form set forth as Appendix C to this Petition. Petitioner, ELLEN R. DAVIS, received the sample ballot on November 3, 1975. On that day, Mrs. Davis notified the Election Commissioners that she considered the ballot printing and format prejudicial (see Appendix D annexed).

The gist of Mrs. Davis' complaint was that the ballot treated the Free Libertarian Party unfairly. The Free Libertarian Party designation was printed in one half the size of the print allotted to the Democratic, Republican, Conservative and Liberal party designations. Mrs. Davis wanted her party to be treated equally. She demanded that the ballot be reprinted so that her party would be given equal size print.

In her Petition, Mrs. Davis pointed out that there seemed to be no justifiable reason for reducing the size of the print of the Free Libertarian Party to one half that given to the major parties, because the Election Commissioners left line "F" of the ballot completely blank.

Mrs. Davis obtained an Order to Show Cause on November 4, 1975, and the matter was heard and determined on that day by Mr. Justice Grady. The Order of the Supreme Court was entered on November 13, 1975, and was unanimously affirmed by the Appellate Division, Second Department on February 9, 1976.

The Court of Appeals denied permission to appeal on May 13, 1976.

The issue on this Petition is whether or not it is constitutional to allot to minor parties one half the space allotted to major parties on the ballot.

REASONS FOR GRANTING THE WRIT

Section 102 (2) of the New York Election Law was applied in a manner that violated the First, Fifth and Fourteenth Amendments to the United States Constitution.

The purpose of the Election Law is to insure that all voters, as far as is practicable, have the equal, easy and unrestricted opportunity to declare their choice for public office (*Callaghan v Voorbis*, 252 N. Y. 14, 17 - 18 [1929]).

Article 5, Section 102 (2) of the Election Law states:

2. All ballots of the same kind for the same polling place shall be of precisely the same size, quality and shade of paper, and of precisely the same kind and arrangement of type and tint of ink. A different, *but in each case uniform kind of type* shall be used for printing the names of candidates the titles of offices, political designations, and reading form of constitutional amendments and other questions and propositions submitted. The names of candidates shall be printed in capital letters in black-faced type not less than one-eighth nor more than three-sixteenths of an inch in height. (Emphasis added).

The regulation of uniformity of ballot is designed to guard against a prejudicial or confusing array of political candidates on the ballot. As the Court pointed out in *Callaghan v. Voorbis, supra*; the clever man has no trouble deciphering the ballot. However, others may be easily confused by the size and complexity of the ballot and the required manipulation of the voting machine.

Petitioner's party, Free Libertarian, qualified for a position on the ballot by an Independent Nominating Petition. Petitioner's party designation, Free Libertarian, is printed on the ballot in a row with another party, Fusion. The Democratic, Republican, Conservative, Liberal, etc., parties each have an entire and unencumbered row, with their party designation in letters twice the size of those of the Free Libertarian Party. Independent and Citizens Choice share a row, as do Free Libertarian and Fusion. One line was left entirely blank. A voter, wishing to vote for the Free Libertarian candidate, could easily scan the ballot and mistakenly read Free Libertarian Fusion as one party, distinct and separate from the Free Libertarian Party. Thus he might change his vote believing that the party of his choice was not listed.

Solely by reason of this listing a voter might also be persuaded that the Free Libertarian and the Fusion parties are allied in their interests. If the voter didn't like the Fusion candidate (or the Fusion Party) he might be swayed against the Free Libertarian, and change his vote.

Matter of Sullivan, (212 App. Div. 848, aff'd 240 N. Y. 576 [1925]), affirms an order directing the Board of Elections of Erie County to provide the Progressive Party with a separate line on the voting machine and to place in that line the names of candidates nominated by that party. Addressing itself to independent bodies, the Court in *Matter of Gilfillan*, (124 Misc 628, 629 [1924], aff'd 212 App. Div. 855, aff'd 240 N. Y. 579), said:

In other respects, the law recognized that independent bodies have as good right as political parties to organize and to nominate candidates ... independent bodies and the voters who adhere to them ought to have the same opportunity to register their choice that any other voter has.

And in *Matter of Crane v. Voorhis*, (257 N. Y. 298, 303 - 304 [1931]), the Court ruled:

The Election Law is aimed to afford facility for ready voting as well as to guard against illegal and dishonest practices. All voters within reasonable regulation must have the same opportunity or else they are disfranchised within the spirit and meaning of the Constitution ... Regulations and restrictions there must be, but these must apply to all alike and not create conditions which make it easy for one but difficult and confusing for another.¹

It is not only the Free Libertarian Party and that party's candidate, the Petitioner, ELLEN R. DAVIS, who is injured by the offending ballot. The Supreme Court of the United States, speaking of a right to a place on the ballot stated:

The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighted in the balance. The right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters. *Lubin v. Panish*, 415 U. S. 709, 716 (1974).

I. To the same effect, see *LaGuardie v. Coben*, 149 Misc 110 (1933); *Aurelio v. Coben*, 291 N. Y. 176 (1943).

Those voters who wish to declare their interests as aligned with the Free Libertarian party and its candidates must either make their way through a confusing listing of their party in order to cast their vote, or unable to do so, must change their vote to a candidate less favorable in their eyes.

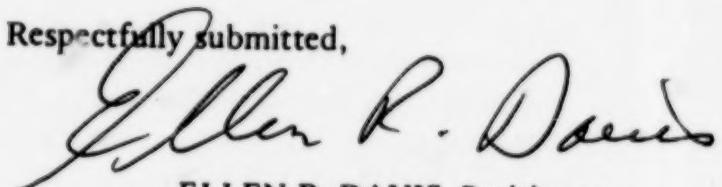
Indeed all voters are injured in that the democratic system which our Constitution guarantees, is prohibited from working properly when men are unable, within the framework laid out by our Constitution and laws, to cast their votes in a free and unimpeded manner.

I believe that one question can focus the issue of this case with such clarity that no answer is necessary. What would have happened had the Commissioners of Election decided that the Republican and Democratic lines should be printed in half the print allotted to the Free Libertarian Party?

CONCLUSION.

A Writ of Certiorari should issue to review the Order of the Appellate Division of the Supreme Court, Second Department, for the reason that Petitioner's Constitutional rights were violated by the action of the Election Commissioners in printing the Free Libertarian Party designation in only half the size of the print allotted to the Democratic, Republican, Conservative and Liberal Parties.

Respectfully submitted,



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Appendix A.

At a Special Term of the Supreme Court of the County of Dutchess, held at the Courthouse, Poughkeepsie, New York, on the 12th day of November, 1975.

PRESENT:

HONORABLE W. VINCENT GRADY
JUSTICE OF THE SUPREME COURT

STATE OF NEW YORK
SUPREME COURT : DUTCHESS COUNTY

IN THE MATTER

of

THE APPLICATION OF ELLEN R. DAVIS,
Petitioner, Appellant ORDER
Index No.
vs. 3829/1975

ALBERT HECHT and LAURA HODAS, as
Commissioners of Election, Constituting
the Board of Election of the County of
Dutchess, Respondents, Respondents.

Upon reading and filing the petition of Ellen R. Davis, sworn to the 3rd day of November, 1975, (together with the two exhibits annexed thereto) in support of a proceeding brought pursuant to Section 330 of the Election Law, upon the grounds that respondents violated Section 102 (2) and Section 248 of

the Election Law, wherein petitioner sought an Order directing that: a) the ballot used by the Town of East Fishkill, Dist. 1, 2, 8 and 9 Dutchess County, New York during the election of November 4, 1975 be declared null and void as it purports to effect the position of "Member of the County Legislature - Dist. No. 20" as set forth under Column No. 8 thereon; b) that the Board of Election hold a special election in the Town of East Fishkill, Dist. 1, 2, 8 and 9 Dutchess County, New York at a time and date to be fixed by this court to fill the position of "Member of the County Legislature - Dist. No. 20" between the listed candidates, Robert R. Horton, George Reid, and Ellen R. Davis; c) that the ballot used in the Town of East Fishkill, Dist. 1, 2, 8 and 9 Dutchess County, New York in said special election, as well as in all future and subsequent elections held in said Town be drafted in strict conformity with the requirements of Article 5, Section 102 (2) and Article 9, Section 248 of the Election Law and d) for such other and further relief as may be just and proper under the Election Law, and proof of due service (in accordance with this Court's Order to Show Cause dated November 4, 1975) having been submitted; and this motion having been submitted to the Court for deliberation by Ellen R. Davis, Pro Se, and Albert L. Hecht, Esq., having been heard on behalf of the respondents; and the Court having had due deliberation thereon, and the Court having rendered its decision in writing, dated November 4, 1975, it is on motion of Ellen R. Davis, Pro Se,

ORDERED, that the decision of the Board of Elections that the ballot complies with the provisions of Section 248 of the Election Law, be, and the same hereby is, in all respects sustained, and, it is further

ORDERED, that the proceeding herein be, and the same hereby is, dismissed.

ENTER

Dated: Poughkeepsie, N. Y.
November 12, 1975

Hon. W. Vincent Grady
Justice Supreme Court

Appendix B

**At a Term of the Appellate Division of the Supreme Court
of the State of New York, Second Judicial Department,
held in Kings County on February 9, 1976.**

HON. JAMES D. HOPKINS, Acting Presiding Justice,

HON. M. HENRY MARTUSCELLO

HON. VINCENT D. DAMIANI

HON. MARCUS G. CHRIST

Associate Justices

In the Matter of Ellen R. Davis,
Appellant,

vs.

Order on Appeal
from Order

Albert Hecht et al., as Commissioners of
Elections of the County of Dutchess,

In the above entitled cause, the above named Ellen R. Davis, petitioner, having appealed to this court from an order of the Supreme Court, Dutchess County, dated November 12, 1975; and the said appeal having been submitted by Ellen R. Davis, appellant pro se, and submitted by John M. Kennedy, Esq. of counsel for the respondents and due deliberation having been had thereon: and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is:

ORDERED that the order appealed from is hereby unanimously affirmed, without costs or disbursements.

ORDERED that the order appealed from is hereby unanimously affirmed, without costs or disbursements.

Enter:

Irving N. Selkin
Clerk of the Appellate Division

Supreme Court of New York
Appellate Division
Second Judicial Department

A/mc

51 A D 2d 743 S - January 13, 1976.

313 E In the Matter of Ellen R. Davis, appellant, v. Albert Hecht et al., as Commissioners of Election, constituting the Board of Elections of the County of Dutchess, respondents.

Ellen R. Davis, Poughkeepsie, N.Y., appellant pro se.

John M. Kennedy, County Attorney, Poughkeepsie, N.Y., for respondents.

In a proceeding, inter alia, to declare the ballot used by the Town of East Fishkill, Districts 1, 2, 8 and 9, during the election of November 4, 1975, null and void as it relates to the public office of Member of the County Legislature, District No. 20, petitioner appeals from an order of the Supreme Court, Dutchess County, dated November 12, 1975, which (1) declared that the ballot complied with the provisions of section 248 of the Election Law and (2) dismissed the proceeding.

Order affirmed, without costs or disbursements.

The petition was properly dismissed.

HOPKINS, Acting P.J., MARTUSCELLO, DAMIANI and CHRIST, JJ., concur.

February 9, 1976. IN RE DAVIS V. HECHT 313 E

Appendix C

* See fold out.

Appendix D

November 3, 1975
Noxon Road
Poughkeepsie, N. Y.

Albert Hecht and Laura Hodas
Dutchess County Board of Elections
Cannon Street
Poughkeepsie, N. Y.

Dear Mr. Hecht and Ms. Hodas:

It has come to my attention that the Town of East Fishkill ballots for the election of November 4, 1975 have been printed with the FREE LIBERTARIAN PARTY designation only half the size of other party designations.

This is an irregularity (see Article 5, sect. 102 of the Election Law) which could prejudice the outcome of the election.

I request that the ballots be re-printed so the FREE LIBERTARIAN PARTY receives equal space and size before the impending election takes place.

Very truly yours,

Ellen Davis
FREE LIBERTARIAN PARTY candidate for County Legislature
(District 20)

Appendix E.

2 Mo. No. 306
In the Matter of
the Application of Ellen R. Davis,
Appellant,
vs.
Albert Hecht & ano., as Commis-
sioners of Election, Constituting
the Board of Elections of
Dutchess County, Respondents.

Motion for leave to appeal denied.

DECISION COURT OF APPEALS MAY 13, 1976

**DIRECTIONS FOR VOTING
ON THE VOTING MACHINE**

SWING the handle of the Curtain Lever from the left to the right as far as it will go, and leave it there. (This will close the curtain around you and unlock the machine for voting.)



On the ballot shown below you will find that the offices or offices to be voted for are listed on the top line to the right of the word OFFICES. The names of the candidates for each office are listed below the title of each office. Above the name of the candidate you will find the voting pointers for the respective candidates. Turn down the pointer over the name of the candidate for whom you wish to vote, from:

Leaving the pointers down in their voting position, swing the handle of the Curtin Lever to the left as far as it will go, and leave it there. This will register your vote and will automatically return the pointers to their first position, after which it will open the curtains.

A FEW WORDS OF EXPLANATION

No votes are registered until you swing the Central Lever to the left to open the curtains. You can therefore make as many changes in your ballot as you wish while the Central Lever is at the right (Central Lever).

Each candidate's voting record is shown below his name.

The machine is so arranged that you cannot turn down more than the proper number of Potions for an elixir.

No votes will be registered for any candidate except those that have Posters left down over their names. So be

Please leave the Political Party over the
names you wish to vote for, then



1. You will find each candidate's Points above his name.
 2. Turn down a Pointer for every Candidate you wish to vote for.
 3. Leave the Pointers down.

100

1. You will find each candidate's Points above his name.
 2. Turn down a Pointer for every Candidate you wish to vote for.
 3. Leave the Pointers down.

IF NAME IS NOT ON VOTING MACHINE

To vote for a candidate whose name does not appear on the machine, raise the diagonal slide (at the top of the machine) above the slide of the other voter and write down the name of whom you wish to vote. **ONCE YOU LIFT THE DIAGONAL SLIDE, YOU CAN NOT PULL DOWN A LEVER IN THE SAME COLUMN.**